Supreme Court, U.S.
FILED

No. 98 443 SEP 14 1998

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In The

Supreme Court of the United States

October Term, 1997

JANET KATHLEEN WAGNER,

Cross-Petitioner,

vs.

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY and VICKIE MAYBERRY,

Cross-Respondents.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the heirs of a decedent may maintain a federal lawsuit under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, against a private citizen for denial of access to the courts while maintaining a state court action for the wrongful death of their decedent.

2. Whether an alleged inadequate police investigation is sufficient to state a cause of action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 when no other recognized constitutional right is involved.

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Janet Wagner respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *DeLew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 143 F.3d 1219 and is reprinted in the appendix to Petitioner's petition for writ of certiorari (hereinafter "Pet.App.") at pp. 1a to 9a. The order of the United States District Court for the District of Nevada, CV-S-97-090-PMP(LRL) dismissing Petitioners' complaint is unreported and is reprinted at Pet.App. 10a to 12a.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals issued its decision and judgment herein on May 11, 1998. Cross-Respondent/Petitioner Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry ("Petitioners" or "DeLews") filed their petition for writ of certiorari on August 10, 1998 and the petition was placed on the docket on August 13, 1998.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari.

STATUTORY PROVISION INVOLVED

The Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 provides:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Janet Wagner was sued in Clark County District Court (State of Nevada) by the DeLews for the wrongful death of Erin DeLew. Erin DeLew died as the result of an automobile/bicycle accident that occurred on September 27, 1994. The original complaint against Janet Wagner was filed on November 10, 1994 in the Eighth Judicial Court of Clark County Nevada. That action is still viable and scheduled for trial in Clark County

District Court in February of 1998. A subsequent action (the instant action), filed on September 26, 1996, asserted a 42 U.S.C. § 1983 civil rights violation against the investigating officers of the automobile/bicycle accident and a conspiracy claim against Janet Wagner.

During the course of discovery in the state court action against Janet Wagner the DeLews have been allowed free, complete and total access to the accident investigation and facts surrounding this accident. At no time have they been denied information concerning the details of the accident or the investigation that followed. Each officer involved in the investigation has testified at length (most for a full day) in deposition about his involvement, about his training and about the procedures for conducting a fatal accident investigation. Each has testified about his contact with Mrs. Wagner, her husband's non-involvement in the investigation and the details concerning their perception of her and her conduct at the accident scene. Appendix A-1 to A-10.

The plaintiffs have not only had full access to the complete laboratory reports concerning Mrs. Wagner's blood/alcohol, but, over the objections of the defendant, they have taken the remaining blood sample and submitted it to their own independent laboratory for analysis.

Despite the fact that the trial judge in the wrongful death action has indicated that the plaintiffs would be allowed to explore the role of the traffic investigators the plaintiffs realize that all evidence points to the culpability of the bicyclist, Erin DeLew. Unless they can put the police on trial in the same case there is little chance for the plaintiffs to prevail in an automobile negligence action.

Even though the original wrongful death action remains viable and is scheduled for jury trial the DeLews brought an

action claiming that they had been deprived of "meaningful access to the courts." The only method to obtain jurisdiction over Janet Wagner in the § 1983 action is to allege a conspiracy. However, the DeLews' complaint is deficient.

A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show that an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act. *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd* 745 F.2d 606 at 609 (10th Cir. 1984).

The complaint against Janet Wagner lacked each of the foregoing items and she moved to dismiss that action on the grounds that: (1) it was an improper splitting of actions; and (2) she was an improper party in a civil rights action. The motion was granted and the district court, *sua sponte* also dismissed the action against the investigating officers.

On appeal to the Ninth Circuit, the court rejected Janet Wagner's argument that she was an improper party with the observation:

> In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[1]

1. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147. Appendix A-11 to A-13.

> Construing these facts in a light most favorable to the Delews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae Delew's death and thereby deprive the Delews of their right of access to the courts. Pet. App. p. 8a, 9a

In a precedent setting decision the Ninth Circuit (for the first time) ignored the requirement (1) that there must be a violation of an underlying civil right, and (2) that there must be an allegation that the defendants agreed to commit an unlawful act as a threshold for stating a cause of action for denial of meaningful access to the courts. *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds sub nom., Hanrahan v. Hampton*, 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980); *Singer v. Wadman*, 595 F. Supp. 188, 270 (D. Utah 1982), *aff'd*, 745 F.2d 606, 609 (10th Cir 1984).

The Ninth Circuit has recognized inadequate investigation as sufficient grounds to state a civil rights claim only when there was another recognized constitutional right involved, that is, when a party claiming the denial of meaningful access to the courts has been denied a constitutionally protected right. *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985) (the Court found no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved); *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996) (police failure to follow up on investigation of reported rape by one of its officers); *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992) (failure to investigate complaints of discrimination by postal employees).

Although the Ninth Circuit determined that the DeLews' § 1983 action for improper and inadequate investigation of a

traffic accident was premature, it ruled that the action should not have been dismissed with prejudice and ordered it remanded to be dismissed without prejudice.

A. Procedural Background

This action was filed two years after the original wrongful death action was filed in State Court. The case was removed to Federal Court and Janet Wagner moved to be dismissed from the action. The District Court granted her motion and *sua sponte* dismissed all claims with prejudice.

The plaintiffs appealed that decision to the Ninth Circuit and the case was reversed with instructions that the case was to be dismissed without prejudice. The Ninth Circuit determined that without an adjudication of on the underlying "wrongful death action" the plaintiffs would not know if they had been denied meaningful access to the courts.

REASONS FOR GRANTING THE WRIT

Should this Court grant the petition for writ of certiorari in this case it will be called upon to review whether a party who is actively seeking redress in state court and who has had full access to discovery has a contemporaneous claim under 42 U.S.C. § 1983 for denial of meaningful access to the courts. The court will further be called upon to determine what, if any, prerequisites must exist before one can assert a claim for "denial of meaningful access to the courts." Finally, this court will be asked to determine the extent of involvement necessary before a civilian can be joined as a co-conspirator defendant in a § 1983 action.

I.

THE NINTH CIRCUIT'S DECISION CONCERNING THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS IS IN CONFLICT WITH ITS DECISION IN *GOMEZ v. WHITNEY* AND THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME ISSUE.

In *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985), the Appellant's son died as the result of an apparent accident while trespassing on a construction site with two other juveniles. For almost two years after his son's death Mr. Gomez attempted to persuade the police to re-open the investigation. When his efforts failed he brought an action under 42 U.S.C. § 1983 claiming that his civil rights had been violated by the police department's inadequate investigation. The Ninth Circuit simply said:

> A prerequisite to recovery under the Civil Rights Act, 42 U.S.C. § 1983, is that the plaintiff prove that the defendants deprived him of a right secured by the Constitution and the laws of the United States. Martinez v. California, 444 U.S. 277, 284, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). A threshold question in this appeal, then, is whether or not the appellants' claim involves the deprivation of a protected right.
>
> The appellants claim that the right infringed was a due process right to have a full and fair police investigation into violence done against themselves or their children. However, we can find no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved. See, e.g., Smith v. Ross, 482 F.2d 33 (6th Cir. 1973) (police failure to protect against housing discrimination).

> Because the appellants have failed to state facts that constitute the infringement of a protected right, n1 their § 1983 claim must necessarily fail, and the district court was consequently correct in granting summary judgment against them. n2 The judgment of the district court is therefore AFFIRMED.

Id. at 1006.

Similarly, in *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992), the Eighth Circuit ruled that the plaintiffs had no constitutional right to an investigation of their complaints. In *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996), the police ignored the plaintiffs complaint of rape by a police officer. The district ruled that without evidence of a policy or practice of failing to investigate complaint of sexual abuse by a police officer, the police department was an improper party. In *Crowder v. Sinyard,* 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 974 (1990), *abrogated on other grounds by Horton v. California,* 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990), the plaintiff's claim for denial of meaningful access to the courts arose out of an illegal seizure and removal of property from the state.

The plaintiffs claim that there right to "meaningful access to the courts" has been denied because the traffic investigation was flawed and covered up evidence favorable to their claim. That allegation, without the infringement of some other constitutional right, is not the basis for a valid claim under 42 U.S.C. § 1983. The plaintiffs must be able to show an illegal search and seizure, an unlawful taking or confiscation of property, an illegal arrest, abuse of police power, or some other infringement of a civil right before a police investigation will provide the nexus for a § 1983 civil rights action.

II.

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT IN THAT IT RECOGNIZES THE EXISTENCE OF A STATE COURT ACTION AND YET RULES THAT A § 1983 MAY EXIST IN THE FUTURE BUT MUST BE HELD IN ABEYANCE.

In its decision the Ninth Circuit observed:

> On November 10, 1994, the Delews filed a wrongful death action against Janet Kathleen Wagner in state court. We are informed that trial is set for February, 1999. Pet. App. 6a.

Obviously the DeLews have had access to the courts and have been allowed to explore through discovery all aspects of the investigation surrounding the DeLew/Wagner accident. Nevertheless the Ninth Circuit determined that the plaintiffs could hold in abeyance a § 1983 action — which could be filed after the termination of the state court action.

There appears to be uniformity among the jurisdictions dealing with a "denial of meaningful access to the courts" arising out of police conduct during an investigation. Research suggests agreement among the circuits (with the exception of the instant case) that a "cover-up" or "refusal to investigate" is not a denial of "meaningful access to the courts" when a viable state action has been filed and the "cover-up" has been discovered.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1996) the court ruled that: (1) the aggrieved party must exhaust his remedies in state court; and (2) that when the alleged cover-up is available to the state court there is no denial of access to

the courts. *See also Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (Despite police officers efforts to defeat a personal injury claim against the police chief's son by revoking a traffic citation, altering the police report, and having new lines painted on the street, the facts were known to the plaintiff and because the state judge could confront those issues there was no denial of access to the courts). *See also Crowder v. Sinyard,* 884 F.2d 804 (5th Cir 1989); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995); *Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994) (police officers who omitted information from police reports did not deny access to court, since facts known to plaintiff were sufficient to enable him to promptly file a lawsuit); *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994). In each of these cases the courts held that access to the state court extinguished any civil rights action under § 1983.

The instant action seems to stand alone in its remedy of holding a potential § 1983 action in suspension pending an outcome of the state court action. The Sixth Circuit suggests that a potential § 1983 action does not toll the running of the statute of limitations and would therefore be untimely. *See generally, Swekel v. City of River Rouge, supra.* and *Joyce v. Mavromatis, supra.*

The unique decision by the Ninth Circuit is fraught with potential problems from *res judicata, stare decisis,* collateral estopple and other due process considerations, to evidentiary issues. No other jurisdiction has suggested such a remedy and the trail court is left to speculate as to what considerations will be given to determine if the state court trial provide "adequate access to the court." The court's solution is unworkable.

III.

THE NINTH CIRCUIT COURT'S DECISION CONCERNING CONSPIRACY IS CONTRARY TO THE PLEADING REQUIREMENTS FOR CONSPIRACY.

The decision of the Ninth Circuit states:

> In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[2]

A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only allege a those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act. *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd* 745 F.2d 606 at 609 (10th Cir. 1984)

It may be argued that an agreement was formed to allow Mrs. Wagner to leave the accident scene, but that act is not associated with any allegation or fact that would suggest that a deprivation of constitutional rights resulted therefrom.

> The Third Circuit recently considered the subject of pleading in civil rights actions, and reaffirmed its prior precedent:

---

2. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147.

> In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity. Kauffman v. Moss, 420 F.2d 1270, 1275-76 (3rd Cir.), cert. denied, 400 U.S. 846, [91 S. Ct. 93, 27 L. Ed. 2d 84] (1970); Negrich v. Hohn, 379 F.2d 213 (3rd Cir. 1967).

Rotolo v. Borough of Charleroi, 532 F.2d 920, 922 (3rd Cir. 1976) (footnote omitted).

The court went on to explain the basis for the rule:

> The rationale of the Negrich requirement that facts be specifically averred was outlined in Valley v. Maule, 297 F. Supp. 958 (D.Conn.1968), and was quoted approvingly in Kauffman v. Moss, supra, at 1276 n. 15:
>
> In recent years there has been an increasingly large volume of cases brought under the Civil Rights Act. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants — public officials, policemen and citizens alike, considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.

Id.

> The complaint at bar falls decisively within the Rotolo-Negrich rule. It contains seventeen pages of factual and legal allegations; yet aside from the paragraphs stating the names and addresses of the individual defendants, it is altogether bereft of any reference to their activities. The conclusory charge of conspiracy in paragraph 41 of the complaint serves as the sole allegation which implicates these defendants at all. Under Rotolo, such a complaint is inadequate.

A conspiracy claim must include an agreement between the defendants to commit an unlawful act and an overt act inflicting the particular injury of which the plaintiff complains. *Hampton v. Hanrahan*, 600 F.2d 600, 620-24 (7th Cir. 1979). Again, neither the agreement to commit an unlawful act nor the overt act are alleged against Mrs. Wagner. The single assertion that Mrs. Wagner left the scene of the accident does little to further the alleged police cover-up. Significantly, even if her short absence from the investigative scene could be an element of conspiracy it has not resulted in any injury to the plaintiffs.

The Ninth Circuit Court's terse treatment of the "conspiracy claim" fails to deal with fundamental issues critical to such a claim. Those issues are totally lacking in the plaintiff's complaint.

CONCLUSION

Should this Court grant the petition for writ of certiorari, it is essential that this Court also examine the prerequisites for bringing an action pursuant to 42 U.S.C. § 1983 for denial of meaningful access to the courts caused by an accident investigation. Similarly, it is critical to Janet Wagner's rights that the Court review the elements essential to join a civilian in a § 1983 civil rights action.

For these reasons, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS FILED OCTOBER 29, 1996

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No. A339613

Dept. No. II

Docket "D"

DELEW, MICHAEL C., ET AL
ESTATE OF ERIN RAE DELEW
MAYBERRY, ROY H.
MAYBERRY, VICKIE

Plaintiff,

VS.

WAGNER, JANET K.

Defendant.

BEFORE THE HONORABLE NANCY A. BECKER,
DISTRICT JUDGE

REPORTER'S TRANSCRIPT RE:

PLAINTIFF'S MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT

TUESDAY, SEPTEMBER 24, 1996

* * *

Appendix A

TUESDAY, SEPTEMBER 24, 1996; 9:00 A.M.

[2] THE COURT: Delew versus Wagner. I don't know if you were able to prepare any opposition, or if you actually have an opposition, Mr. Edwards.

MR. EDWARDS: I have submitted to the Court a — and I had it delivered to chambers, a seven page opposition to the plaintiff's motion, Your Honor.

THE COURT: Argument, Mr. Foley?

MR. EDWARDS: I would like the Court to have the opportunity to review that before we —

MR. FOLEY: And I did —

THE COURT: All right. I'll let you argue today, I'll take it under advisement and then I'll read the opposition.

MR. FOLEY: And I did receive the opposition, Your Honor.

This is our Motion to Amend the Complaint, Your *Honor*. It's a very difficult case. The basic facts are that Erin Delew as was riding a bicycle and was run over by a motorist and killed. The motorist was a Metro police officer's wife. The motorist, through deposition now, admits that she had had — purchased three beers and consumed the better part of three beers through a straw on her way home from work. She admits that she was speeding at the time of the accident. The problem is she wasn't cited and she wasn't given a blood alcohol test until some three [3] hours after the accident.

Her husband, who is a traffic officer, or was at the time with Metro — this happened right in their neighborhood and he was one of the first people to arrive at the scene. Over the course of the three hours there were over twenty Metro and Nevada Highway Patrol officers who arrived at the scene. Some smelled alcohol. In fact, in one instance the highway patrolman who had been called to the scene, because Metro apparently said they had a conflict, but yet they stayed at the scene — one highway patrolman said to Mrs. Wagner, I thought I smelled alcohol on your breath earlier, and a lieutenant from Metro stepped forward and said, you know, that was probably me, I was having a beer with dinner.

What we're seeking to do at this point in time, now that we've taken virtually all of these officers' depositions, is to amend the complaint to assert 1983 actions. The opposition by Mr. Edwards goes into a number of issues. Primarily he's making a Motion to Dismiss on behalf of Metro, saying that it's not a proper 1983 action. The fact is that under Rule 15 leave to amend should be freely granted unless there's undue delay, bad faith, or dilatory motive. Which can't possibly be argued in this case. We have taken extensive discovery to get to the heart of this cover-up.

What may happen in the future, whether someone files a [4] Motion to Sever or whether someone files a Motion to Dismiss, so be it. But, we should be allowed to amend the Complaint to bring these parties in, and they're all critical to this one case. If we had to pursue two cases, we'd be calling the exact same witnesses to the stand on every case. Because of the fact that, for instance, in the wrongful death case, we have to call the police officers because they didn't do the blood alcohol test, they didn't do the reconstruction. We need them

to testify as to what they saw at the accident, what they did at the accident, and what they didn't do at the accident. Because we're going to have to show by circumstantial evidence that she was intoxicated and he was being protected by her husband. Same thing goes in the 1983 action. Mrs. Wagner and all of the percipient witnesses will be witnesses in that trial. It will be an absolute and complete duplication of the trial. Thank you.

THE COURT: Mr. Edwards.

MR. EDWARDS: Several things, Your Honor. First of all, to put this case in the proper setting, let me, if I may, just read from the only eyewitness' report to Metro.

"As I came up to Lake Mead, I saw a woman on a dark bike, no strobe or lights, swerving a lot because she was trying to negotiate turning to cross the street going uphill, plus she had a bag of groceries she was carrying. She had trouble getting any speed to cross. She may not have seen the Explorer coming [5] towards her because she had a headset on. The Explorer certainly could not see her until it was too late because the road was curving, trees blocked the vision in mid or divider as driver came up no faster than the speed limit. I noted that because before impact I realized the Explorer would collide with the bike-rider before it happened."

Now, the plaintiff in this case is attempting to bring in not circumstantial evidence, but collateral evidence to create an illusion that there is collusion where none existed. What actually happened in this case was that when the police arrived they saw who the driver was and they called in an independent investigating force to conduct the investigation. As a result of that my client was prejudiced, not his. Because my client was

the one that didn't have the blood test taken within the appropriate two hours and, if she had, it would have shown that the alcohol she was drinking fifteen minutes before the accident hadn't even entered her bloodstream at the time of the accident. They —

THE COURT: Oh, I'm sure if she said, hey, give me a blood test right now, they would have done that, Mr. Edwards. I don't have too much doubt that — But, under the circumstances that's not the issue at the moment.

MR. EDWARDS: Well, that's right. What they're attempting to do, in fact they have done in this case, is that they have [6] taken the deposition of — I think it's eleven different police officers, every officer that was at the scene, except possibly two or three peripheral officers, they have deposed. They have deposed those after they intended to bring Metro into the case and have done the discovery and obtained those depositions before bringing Metro into the case. Those depositions aren't even admissible as to Metro. This case — There's an attempt to try by collateral evidence issues that don't have any bearing on the wrongful death.

And the simple fact of the matter is that a 1983 action doesn't even lie on behalf of the decedent. The decedent is on — unfortunately, was killed instantly. When the Metro officers arrive, anything they do after that point has no bearing on her civil rights. And the Ninth Circuit has ruled on that very issue. The Ninth Circuit points out, in the case of *Cartwright versus City of Concord*, defendant's argue that no post death events could legally interfere with the plaintiff's alleged constitutional rights under the authority of *Guiden versus Phillips*. And it goes on to say those authorities are persuasive that the civil

rights of a person cannot be violated after death. So, a 1983 action doesn't even lie on behalf of the decedent.

The real issue is was there negligence by the driver when the decedent was killed. That can be tried. That can be tried without — And in fact, we've been doing discovery for two [7] years on that very issue. And can be tried without any involvement or any action against the police officers. If they feel like they have an action against the police officers, let them bring it. But, not in this case. It doesn't belong in his case. There's been too much water under the bridge, there's been too many things done that are improper in this particular case for them to try to bring into this case and try this case on collateral issues. And that's what they would like to do.

What they would like to do is try the police officers and their investigation to prove my client was negligent. And my client's negligence can stand or fall on its own, I have no problem with that. I am here to defend her and I can defend her, I can defend her with whatever evidence is direct and specific to her. And if they have — There's a difference between circumstantial evidence and collateral evidence. If there is circumstantial evidence, that comes in. Collateral evidence comes in to a point, but it doesn't come in to prove negligence and it can't create an illusion or a fiction that doesn't exist. And NRS —

THE COURT: All right, Mr. Edwards. I've read the opposition. I'm not going to allow you to amend the Complaint because I think you need to file a separate lawsuit, Mr. Foley. I'm not going to try — Because there are issues about whether or not the heirs can maintain a civil rights action for whatever [8] diminution in value of their case is of their personal injury lawsuit as a result of the investigation.

While I recognize that many of the witnesses may be the same in both lawsuits, assuming that you have a cause of action, which another judge can decide on a Motion to Dismiss, the problem that I have is, one, all these depositions and all of the discovery was taken when these people were not party, and therefore they were not represented with that in mind. And I think that you're going to have to go back through the discovery and go back through those issues when that party has been fully informed of the nature of the charges against the particular police agencies and/or the officers involved and try it as a separate issue.

Certainly you can call in all those witnesses here as to what they saw or observed and why they did or didn't do what you believe should have been standard tests, and that the inference that they didn't do it is because it would have been negative to Mrs. Wagner, but I'm not going to allow you to amend and bring in that separate cause of action into this case.

MR. FOLEY: I understand, Your Honor. If I might — we will file the lawsuit separately — I'd like to ask Your Honor, so that we could have an opportunity to properly brief it, if your order could be without prejudice, so that we could file a Motion to Consolidate down the road.

[9] THE COURT: No, I'm not going to consolidate a civil conspiracy case in with a personal injury. Because the issue with regard to the personal injury is the negligence and —

MR. FOLEY: I understand, but it's so hard to prove negligence when the evidence is not gathered. And quite frankly, Mrs. Wagner is going to be a party in both suits. Again, and I'm very conscious of not arguing with Your Honor, but —

THE COURT: No. I think that the —

MR. FOLEY: — just so that we can present points and authorities —

THE COURT: — prejudice of trying them together outweighs trying to make two separate claims. A civil rights case requires some very, very specific things under federal and state law, and you may not have any of that, and that should be treated separately because the damages from that are separate. I mean, you don't lose the personal injury case, then there is no case because there's no damages in the civil conspiracy case.

MR. FOLEY: That's not true, Your Honor. We've got authority for that. Unfortunately we haven't briefed it, but what we have is an aggravation of loss of consortium. The police, as a result of their investigation, concluded and told the family that this woman had apparently committed suicide. She was a good bicyclist and she just blindly drove her bicycle in front of this vehicle. Where the facts as they came out and [10] started coming out were that, again, some three hours later she has a point o-five —

THE COURT: That Mrs. Wagner may well have been under the influence, right.

MR. FOLEY: Well, there's no —

THE COURT: Or may not have been.

MR. FOLEY: She had been drinking alcohol, in any event.

THE COURT: Correct.

MR. FOLEY: And again, there had been speeding and there had bean a cover-up. So, the point Your Honor made with respect to damages, they are interrelated. Even if we win the wrongful death case, or even if we lose the wrongful death case, we still pursue the civil rights case from the damage standpoint.

THE COURT: Well, I honestly believe that to try them both just isn't appropriate. Perhaps if you'd brought them both at the very beginning I might have felt differently. But, having conducted all of these depositions with people who were being deposed as percipient witnesses and not as defendants, I'm not going to allow that to occur that now you bring in all of those same people as defendants and then have to go through the arguments about now can the discovery be used, or not used, and what the circumstances may be. File your separate lawsuit and you can deal with it under that circumstance.

* * *

APPENDIX B — EXCERPTS FROM DEPOSITION OF JANET KATHLEEN WAGNER DATED NOVEMBER 7, 1995

DISTRICT COURT
CLARK COUNTY, NEVADA

Case No. A339613
Dept. No. XIII
DOCKET NO. "G"

DEPOSITION OF JANET KATHLEEN WAGNER
November 7, 1995

MICHAEL C. DELEW, individually; MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Plaintiffs,

vs.

JANET KATHLEEN WAGNER, and DOES I through V inclusive, and ROE CORPORATIONS V through X,

Defendants.

* * *

[145] Q Any other car, patrol car?

A Yes. I sat in a patrol car.

Q Just one patrol car or more than one?

A Once or twice. I don't recall if it was the same car or not.

Q Okay. Do you know whose patrol car it was?

A No.

Q How is it that you ended up sitting in a patrol car? What led to sitting in that patrol car?

A It was sometime after the accident had occurred, and I asked if I could go home to use the restroom, and they drove me to the house to do that.

Q Okay. Who drove you to the house?

A I don't know who they were.

Q Was your husband with you?

A Yes.

Q And where were you sitting?

A In the back seat of the car.

Q And where was your husband sitting?

A In the back seat of the car.

Q And were there two officers in the front?

A Yes.

Q And you don't know which officers they were?

[146] A No, I don't know that I even saw who they were.

Q And what was said in the car on the way to your house?

A I don't recall anything being said.

Q What route did the patrol officer take to get to your house from, from there, from the scene?

A I remember them bringing me north on Hillpointe rather than south on Hillpointe. They took a street other than going straight up Lake Mead. I think that's because it was blocked off, you know, with the accident investigation going on. And I don't remember specifically what street they drove down though.

Q When you left Lake — when you left the scene of the collision were you going west or east on Lake Mead?

A I'm sorry. What?

Q When you left the scene of the collision with those two officers and your husband were you going left — I'm sorry — were you going west or east on Lake Mead?

A I don't remember where their car was originally parked or stationed. We didn't go west on Lake Mead from Ridgemoor, although we may have traveled a short distance west to go to

Ridgemoor and possibly then go south would be my guess. I don't specifically remember doing that.

[147] Q Did they use their overhead lights at any time?

A Not that I'm aware of.

Q And when you got to your house, did the officers come in?

A No

Q Did your husband come in with you?

A I think he did come in. Yes. Yes.

Q Which bathroom in the house did you use? Did you use your master bathroom where your bedroom was?

A No. I used one downstairs that's closer to the front door.

Q Do you know if the officers when they took you to your home, did they radio into dispatch to tell them that they were taking you to —

A I have no idea.

Q Did you have a glass of water when you were at home?

A I don't recall doing that, no.

Q Was your mouth at all parched after the collision?

A I don't remember specifically, no.

Q Did you drink any water at the collision or at your home?

A I remember somebody offering me water, but I don't remember if I drank it or not.

[148] MR. RASTELLO: Do you want to take a break?

MR. EDWARDS: I will in a minute.

Q (BY MR. RASTELLO) In the bathroom where you went to the bathroom at home, do you have a cup or paper cups that you could have used to drink water?

A I wouldn't have had any paper cups. There may have been a cup in there at the time. I don't remember what I had sitting in the bathroom there at the time.

Q Did you go to the kitchen?

A I don't remember doing that, no.

Q Okay. Were you and your husband alone in the house at that time?

A Again, I'm not sure if he even came into the house or just to the door but there was nobody else there at the time, no.

Q Okay. Did you and your husband have a conversation at the house, either inside the house or right outside the house?

MR. EDWARDS: You can answer yes or no.

A No.

Q (BY MR. RASTELLO) Nothing was said?

A Not that I remember, no.

* * *

(2) (2)

Supreme Court, U.S.
FILED
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Nos. 98-443 and 98-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET KATHLEEN WAGNER,

Cross-Petitioner,

v.

MICHAEL C. DELEW, *et al.*,

Cross-Respondents.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; STATE OF NEVADA, EX REL.; NEVADA HIGHWAY PATROL; LIEUTENANT EDWARD JENSEN; SERGEANT RICHARD WOMACK; SERGEANT CURTIS ALBERT; SERGEANT THOMAS HARMON; DETECTIVE RICHARD HART; DETECTIVE WILLIAM JOHNSON; OFFICER WILLIAM SMITH; OFFICER KEITH BOWERS; OFFICER DAVID WAGNER; OFFICER GREG GOEN; SERGEANT WILLIAM ADAMSON; SERGEANT HARVEY WEATHERFORD; TROOPER JOSEPH A. SMITH; TROOPER GARTH GARDNER; TROOPER JOSEPH WYNGARD; AND TROOPER JAMES BARNUM,

Cross-Petitioners,

v.

MICHAEL C. DELEW, *et al.*,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

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CROSS-RESPONDENTS' COMBINED BRIEF IN OPPOSITION

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25 pp

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October 22, 1998

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Cross-respondents Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") respectfully submit this combined response in opposition to the separate Conditional Cross-Petitions for Writ of Certiorari filed by petitioners Janet Kathleen Wagner ("Wagner") and the Las Vegas Metropolitan Police Department, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, and Officer Greg Goen (collectively referred to as the "Police Defendants").

STATEMENT OF THE CASE

Cross-Petitioners' separate statements of the case are replete with significant errors and omissions. In the interest of brevity, the DeLews refer the Court to and incorporate the accurate statement of the case in their own Petition for Writ of Certiorari. *See* Petition for Writ of Certiorari ("DeLews' Pet.") at 4-8.

Pursuant to Supreme Court Rule 15.2, the DeLews highlight Cross-Petitioners' most egregious misstatements:

1. Mrs. Wagner states that the DeLews have had full access to the laboratory reports concerning Janet Wagner's blood alcohol test and were able, over her objections, to have the remaining blood independently tested. Wagner Conditional Cross-Petition for Writ of Certiorari ("Wagner's Cross-Pet.") at 3. This is a half-truth at best. The investigating Police Defendants' deliberate disregard for standard operating procedures led to (a) a failure to perform a blood alcohol test within two hours of the fatal collision, and (b) a failure to take two blood draws separated by time. As a result of this aspect of the cover-up, the lab reports available to the DeLews were

of little use—they could not reveal the rate of dissipation of alcohol in Mrs. Wagner's system, and there was insufficient blood remaining for independent analysis. *See* Supplemental Appendix ("SA") to LVMPD's Conditional Cross-Petition for Writ of Certiorari ("Police Defendants' Cross-Pet.") 7, 8 (Complaint) at ¶ 22(b), (j).

2. Mrs. Wagner states that at no time have the DeLews been denied information concerning the details of the accident or the investigation that followed. Wagner's Cross-Pet. at 3. This is simply untrue. As noted above, a critical detail was just how drunk Mrs. Wagner was when her car struck Erin DeLew; but the defendants' sabotage of the investigation ensured that this information never would see the light of day. By deliberately failing to obtain percipient witness statements or to measure Mrs. Wagner's skid marks, the Police Defendants also guaranteed destruction of that critical evidence. Adding insult to injury, the defendants affirmatively misled the DeLews from the true facts, including through the issuance of a report that falsely blamed Erin DeLew for the collision. SA 7, 8 (Complaint) at ¶ 22(c)-(d), (f)-(h).

3. The Police Defendants inaccurately state that "the basal facts of the litigation" for purposes of reviewing the district court's and Ninth Circuit's distinct dismissal orders are "DELEWS' Complaint, the arguments and exhibits found in WAGNER'S Motion to Dismiss and its resultant progeny." Police Defendants' Cross-Pet. at 5. In fact, the only relevant allegations are those in the complaint. The lower courts were required to construe all those allegations in the light most favorable to the DeLews, as the nonmoving parties. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

4. The Police Defendants state that the Nevada Highway Patrol gave Mrs. Wagner a field sobriety test. Police Defendants' Cross-Pet. at 6-7. The Police Defendants know that she was given no such test—they administered only a horizontal gaze nystagmus ("HGN") test. SA 7 (Complaint) at

¶ 22(a). The HGN test involves shining a flashlight in the individual's eyes and asking her to follow the beam with her eyes. It does not test physical coordination and, perhaps more importantly, it does not have to be done in such a way that any bystanders can see the results of the test, as would be the case with an actual field sobriety test.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS COURT SHOULD DECLINE TO REVIEW THE NINTH CIRCUIT'S CONFIRMATION OF A WELL-ESTABLISHED CONSTITUTIONAL RIGHT—THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS—WHERE THERE IS NEITHER A SPLIT AMONG THE CIRCUITS NOR ANY MERIT TO CROSS-PETITIONERS' ARGUMENTS.

The complaint alleges a police cover-up that denied the DeLews of their constitutional right of meaningful access to the courts. The Ninth Circuit agreed that this constitutional right exists.[1] Mrs. Wagner and the Police Defendants now ask this Court to grant their Cross-Petitions in order to hold that *there is no constitutional right of meaningful access to the courts*. This Court should decline that invitation for distinct reasons. *First*, the Court already has recognized the very right that Mrs. Wagner and the Police Defendants now attack, yet those parties offer no reason for the Court to overrule its earlier decisions. *Second*, the Police Defendants are incorrect

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[1] However, the Ninth Circuit then dismissed the DeLews' complaint on the grounds that the related state tort claims must be adjudicated before the DeLews may pursue their claims under §1983, and then the DeLews must show that "any" and "all" state remedies proved "ineffective." *DeLew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998). This holding is contrary to established law and other circuit court decisions and is the subject of the DeLews' petition.

in contending that § 1983 liability for a police cover-up and conspiracy is contingent on the underlying wrong being a constitutional violation, and there is no good reason for the Court to review the Ninth Circuit's rejection of the Police Defendants' argument to that effect. *Third*, neither this Court's decisions nor cases from lower courts remotely support Cross-Petitioners' insistence that a litigant's ability simply to file a complaint establishes meaningful access to the courts. *Fourth*, the Ninth Circuit's recognition of the validity of the DeLews' constitutional claim creates no conflict among the lower courts.

A. This Court Already Has Recognized The Fundamental Right Of Meaningful Access To The Courts, Which Cross-Petitioners Now Seek To Eliminate.

In case after case, this Court has recognized the right of meaningful access to the courts. In *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907), the Court characterized "the right to sue and defend" as "one of the highest and most essential privileges of citizenship," which "lies at the foundation of orderly government." *See* DeLews' Pet. at 2 n.1 (citing this Court's decisions that have recognized the right of meaningful access to the courts under various constitutional provisions). In *Bounds v. Smith*, 430 U.S. 817, 820 (1977), the Court made clear that mere technical access is insufficient to comply with the Constitution; instead, access must be "adequate, effective and meaningful."

In light of these decisions, there is no good reason—and certainly none is advanced by Cross-Petitioners—for the Court to reconsider the existence of the right of meaningful access to the courts.

B. It Is Well-Established That § 1983 Cover-Up Liability Is Not Contingent On The Underlying

Wrong Being A Constitutional Violation; This Court Should Not Take On That Non-Issue.

Mrs. Wagner and the Police Defendants argue that the Ninth Circuit erred in recognizing the DeLews' claim of deprivation of the right of meaningful access to the courts because the underlying wrong—Mrs. Wagner's killing of Erin DeLew—was not an independent constitutional violation.[2] To the extent that Cross-petitioners' citation to cases might suggest a split among the circuits, this Court should not be misled. None of the cited decisions (nor any others of which counsel for the DeLews is aware) comes close to holding that a cover-up claim under § 1983 must allege a cover-up of a distinct constitutional violation.

The underlying wrongs in most of the cases that the Police Defendants cite at pages 10-12 of their Cross-Petition happened to be constitutional violations. However, in none of those cases did the court hold that the underlying action *must* have been a constitutional violation in order for a § 1983 cover-up claim to proceed. Those courts did not speak to the issue that Mrs. Wagner and the Police Defendants have invented here because the issue was not present in those cases. Rather, based on this Court's already-clear guidance, the lower courts "recognize a right of access to the courts without tying the right to some underlying federal right that the plaintiff wants access to the courts in order to enforce." *Peña v. Mattox*, 84 F.3d 894, 902 (7th Cir. 1996); *see also Jackson v.*

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[2] *See* Wagner's Cross-Pet. at 8 ("The plaintiffs [*sic*] claim that there [*sic*] right to 'meaningful access to the courts' has been denied because the traffic investigation was flawed and covered up evidence favorable to their claim . . . without the infringement of some other constitutional right, is not the basis for a valid claim under 42 U.S.C. § 1983."); Police Defendants' Cross-Pet. at 10 ("It is only when actions are undertaken to deliberately conceal or cover up constitutional violations that the protections of 42 U.S.C. § 1983 *may* be invoked to ensure proper redress.") (emphasis in original).

Procunier, 789 F.2d 307, 310 (5th Cir. 1986) (noting that from its inception the right of access to the courts has been applied to civil as well as constitutional claims, and that "interference with access to the courts may constitute the deprivation of a substantive constitutional right, . . . and may give rise to a claim under §1983").

The lower courts regularly have permitted § 1983 cover-up claims to proceed even where the underlying wrongdoing did not establish an independent constitutional violation. *See, e.g.*, *Vasquez v. Hernandez*, 60 F.3d 325, 326-27 (7th Cir. 1995) (underlying incident was negligent injury caused by drunk, off-duty policeman while target shooting at home) (dismissed on other grounds); *Foster v. City of Lake Jackson*, 28 F.3d 425, 427 (5th Cir. 1994) (underlying wrong was traffic fatality allegedly caused by city's negligence) (dismissed on other grounds); *Gibson v. City of Chicago*, 910 F.2d 1510, 1512-13 (7th Cir. 1990) (underlying wrong was shooting by officer on medical leave) (dismissed on other grounds); *Ryland v. Shapiro*, 708 F.2d 967, 969 (5th Cir. 1983) (underlying incident was murder by prosecutor who, needless to say, was acting outside of his prosecutorial duties); *Fisher v. City of Cincinnati*, 753 F. Supp. 681, 687 (S.D. Ohio 1990) (underlying wrong occurred when drunk, off-duty policeman injured plaintiff in automobile collision).

Thus, no lower court has accepted Cross-Petitioners' argument that the underlying, covered-up wrongdoing must have been an independent constitutional violation. Because neither the litigants nor the lower courts require any further direction on this non-issue, the Court should decline to address it on certiorari.

C. The Ninth Circuit Opinion Does Not Decide The Import Of A Party's Mere Ability To File A Complaint; In Any Event, The Law On This Issue Is Already Clear.

Mrs. Wagner and the Police Defendants argue that the Ninth Circuit erred in holding that the DeLews stated a claim for deprivation of their right of meaningful access to the courts despite the fact that they were able to file a wrongful death complaint in state court. According to Cross-Petitioners, the mere ability to file a complaint constitutes meaningful access, even where a conceded police cover-up and conspiracy has resulted in the destruction of the most favorable evidence to the plaintiffs, and in the fabrication of false evidence harmful to the plaintiffs' wrongful death action. *See* Wagner's Cross-Pet. at 9-10; Police Defendants' Cross-Pet. at 13-17.

In fact, the Ninth Circuit did not state the holding ascribed to it by Cross-Petitioners. To the contrary, the court of appeals *dismissed* the DeLews' § 1983 claim until the DeLews show that "any" and "all" state remedies have proven "ineffective." *DeLew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998). For the reasons set forth in the DeLews' own Petition for Writ of Certiorari, the Ninth Circuit's dismissal was error, which this Court *should* review. But there is no reason to review a purported holding that does not even appear in the Ninth Circuit's decision, which Cross-Petitioners would have the Court do.

In addition, Cross-Petitioners' arguments fail on the merits. The Police Defendants' reliance on *Lewis v. Casey*, 518 U.S. 343 (1996), *see* Police Defendants' Cross-Pet. at 14-15, is particularly misplaced. *First*, *Lewis*, addresses prisoners' rights to petition the courts; it has nothing to do with governmental cover-up claims. *Second*, in *Lewis* the Court emphasized the tension between a prisoner's right to meaningful access to the courts and the state's interest in confinement of criminals, *id.* at 361; no such tension exists in

this case. *Third*, nothing in *Lewis* suggests that a non-prisoner's right to meaningful access to the courts is satisfied merely by the party's ability to file a complaint; the Court simply held that the government was not required to provide prisoners with full-time legal counsel to assist in discovering or litigating grievances. If *Lewis* has any relevance to this case, it is its reinforcement of the right of meaningful access confirmed in *Bounds*, and that this right is violated when state actors "hinder[ ]", "frustrate[ ]", or "impede[ ]" a party's access to the courts. *Id.* at 351-53.

Cross-Petitioners' lower court cases are equally inapposite. For example, their citation to *Foster*, *see* Wagner's Cross-Pet. at 10; Police Defendants' Cross-Pet. at 15 & n.5, is baffling. In that case, the Fifth Circuit expressly *declined* to hold that the right of meaningful access to the courts protects only the right to institute the action; instead the court held that at the time of the cover-up activities at issue (discovery abuses in a prior wrongful death action), it was not clearly established that the right to meaningful access encompassed abusive discovery conduct. *Id.* at 429; *see also, e.g.*, Police Defendants' Cross-Pet. at 15 (citing *Ryland*, for proposition that "'interference' associated with a 'cover-up' [is limited] to the filing of a complaint"; but *Ryland* in fact puts no limits on what constitutes "interference" triggering cover-up liability, *Ryland*,. 708 F.2d at 975).

In fact, in case after case, the lower courts have correctly recognized that the mere filing of a complaint does not automatically satisfy the constitutional right to adequate, effective, and meaningful access to the courts. *See, e.g.*, *Nielsen v. Clayton*, 62 F.3d 1419 (Table), 1995 WL 417569 at *7 (7th Cir. July 11, 1995) ("The violation of the right of access to the courts, however, need not necessarily entail or result in the denial of a party's right to pursue a claim in court."); *Jackson*, 789 F.2d at 310 ("Any deliberate impediment to access, even a delay of access may constitute a constitutional deprivation"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261

(7th Cir. 1984) ("Though [plaintiff] filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress . . . ."); *Gonsalves v. City of New Bedford*, 939 F. Supp. 921, 927 (D. Mass. 1996) ("[I]f the mere filing of a suit was sufficient in every case to extinguish a § 1983 claim for cover-up, the concept would be a nullity because the issue of cover-up is only presented to a court once a case is filed."); *Benton v. Bocian*, No. 86C5367, 1987 WL 26068, at * 4 (N.D. Ill. Dec. 1, 1987) ("[A]ny conduct by defendants that delayed [plaintiff's] ability to maintain this action deprived her of her protected right of access to the courts. The law does not recognize a distinction between a 27-day delay and a 20-year delay. . .").

In short, the Court should decline to grant certiorari review in order to hold, as Cross-Petitioners wish, that the filing of a complaint for the underlying wrong extinguishes a party's cover-up claim as a matter of law. The Ninth Circuit did not reach the opposite conclusion, there is no conflict with decisions of this Court or other circuits, and the issue does not warrant the Court's consideration.

D. The Ninth Circuit's Decision As To The Cognizability Of The DeLews' Constitutional Claim Does Not Create A Conflict Among The Circuits.

Both Mrs. Wagner and the Police Defendants argue that the Ninth Circuit's recognition of the DeLews' constitutional right of meaningful access to the courts conflicts with decisions both within and outside the Ninth Circuit. Wagner's Cross-Pet. at 7-8; Police Defendants' Cross-Pet. at 9-10. In fact, there is no conflict. Cross-Petitioners' conflict theory rests on a calculated mischaracterization of the DeLews' claims.

Throughout the proceedings below and now before this Court, Mrs. Wagner and the Police Defendants have tried to

ignore the DeLews' claim of a police cover-up and infringement of meaningful access to the courts. Instead, they have insisted on misstating the DeLews' claims as based only on an inadequate investigation. Cross-Petitioners are arguing a straw man—the viability of a claim of failure to investigate. That is not an issue in this case and it is not an issue decided by the Ninth Circuit.

Nowhere in the DeLews' complaint, briefs or arguments below do they mention or rely upon inadequate investigation as the basis for their § 1983 cause of action. The DeLews base their claim on the intentional subversion of the investigation by Mrs. Wagner and the Police Defendants—on those parties' malfeasance rather than nonfeasance. The DeLews allege that the Police Defendants, upon learning the circumstances of Erin DeLew's death, "successfully covered-up the true facts by: (1) deliberately refraining from performing a field sobriety test on Wagner; (2) deliberately refraining from performing a chemical blood alcohol test on Wagner within two hours of the fatal accident; (3) deliberately failing to preserve physical evidence such as skid marks and relevant debris; and (4) allowing Wagner to leave the scene of the accident," and that Mrs. Wagner conspired with them to take those affirmative steps to cover-up the true facts. *See DeLew*, 143 F.3d at 1221; *see also* SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37 (failure to take witness statements, misrepresenting facts to plaintiffs and coroner's office investigator, issuing false police report).

Thus, there is no conflict with the Ninth Circuit's decision in *Gomez v. Whitney*, 757 F.2^{d} 1005 (9th Cir. 1985), or with the decisions of other circuits in *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992), and *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996). In each of those cases, plaintiffs alleged a complete failure to investigate or an inadequate investigation; they were not deliberate cover-up cases and, as a result, they do not conflict with the Ninth Circuit's decision in this case.

Equally inaccurate are the Police Defendants' statements that "DELEWS does not contend LVMPD gave false information in the investigation or that they failed to properly perform a blood draw," and that "the Complaint only asserts LVMPD had the *authority* to conduct an investigation in a timely manner, but chose not to do so." Police Defendants' Cross-Pet. at 10 (emphasis in original). To the contrary, the complaint includes specific allegations that the Police Defendants gave false information, actively obstructed the investigation, and failed to properly perform a blood draw. SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37. *See supra* 1-2 at ¶¶ (1)-(2). These affirmative acts, among others, rather than a merely faulty or negligent investigation, denied the DeLews of their constitutional right of meaningful access to the courts.

II.

CERTIORARI REVIEW IS INAPPROPRIATE WHERE THIS COURT'S DECISIONS AND THE ALLEGATIONS OF THE DELEWS' COMPLAINT FULLY SUPPORT THE NINTH CIRCUIT'S RECOGNITION OF THE DELEWS' CONSPIRACY CLAIM AGAINST MRS. WAGNER, AND THERE IS NO SPLIT AMONG THE CIRCUITS.

Mrs. Wagner asks this Court to review the Ninth Circuit's ruling that the DeLews' complaint states a claim against Mrs. Wagner for conspiracy in the Police Defendants' alleged cover-up. Wagner's Cross-Pet. at 11-13. But this issue does not warrant the Court's exercise of its certiorari jurisdiction. *First*, the Ninth Circuit's ruling finds clear support in this Court's decisions. *Second*, there is no split in the circuits that requires this Court's intervention on the conspiracy issue. *Third*, the Ninth Circuit's straightforward application of the well-established law regarding a private individual's liability for conspiracy under § 1983 was correct.

A. The Court Already Has Rejected Mrs. Wagner's Argument That A Conspiracy Claim Under § 1983 Must Allege Specific Facts To Show An Express Agreement Between The Actors.

Mrs. Wagner argues that the conspiracy allegations against her are deficient because they do not allege that she and the remaining defendants expressly agreed to commit an unlawful act. Wagner's Cross-Pet. at 11-13. In rejecting this argument, the Ninth Circuit relied on this Court's decision in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). *See DeLew*, 143 F.3d at 1223.

The *Adickes* case is indeed dispositive. There the Court held that § 1983 provides relief where the private and state actors "somehow reached an understanding" to deprive the plaintiff of a constitutional right. *Adickes*, 398 U.S. at 152. This holding remains good and fundamental law. Section 1983 does not require an express agreement. *See Lugar v. Edmundson Oil Co., Inc.*, 457 U.S. 922, 928 n.6 (1982) (joint action between private party and state official will support a § 1983 claim); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) ("It is enough that [a private party] is a willful participant in joint action with the state or its agents.").

Because the law on Mrs. Wagner's conspiracy issue is well-established, there is no reason for this Court to review the question on certiorari.

B. There Is No Split Among The Circuits On The Conspiracy Ruling.

In an apparent attempt to create an issue worthy of review on certiorari where none actually exists, Mrs. Wagner misstates the holdings of several cases from other circuits. The Court should reject any suggestion of a split in authority among the circuits.

Mrs. Wagner cites *Singer v. Wadman*, 595 F.Supp. 188 (D. Utah 1982), *aff'd* 745 F.2d 606 (10th Cir. 1984), for the proposition that "42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only allege a [*sic*] those in which the plaintiff has alleged that the defendants agreed to commit an unlawful act." Wagner's Cross-Pet. at 11. However, *Singer* holds the exact opposite: "it is unnecessary that each participant in a conspiracy *expressly agreed* . . . ." *Singer*, 595 F.Supp. at 270 (emphasis added). The decision further states that "[t]he participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan . . . or possess the same motives . . . ." *Id.* at 271. The Tenth Circuit, in affirming *Singer*, makes no mention of a requirement of an agreement, but rather defines a civil conspiracy as "the combination of two or more persons acting in concert." *Singer*, 745 F.2d at 609.

Similarly, Mrs. Wagner's reliance on *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), is inexplicable. Wagner claims that *Hampton* stands for the proposition that "a conspiracy claim *must* include an agreement between the defendants to commit an unlawful act . . . ." Wagner's Cross-Pet. at 13. However, the Seventh Circuit actually held that "an express agreement among all the conspirators is not a necessary element of a civil conspiracy." *Hampton*, 600 F.2d. at 621. Rather, "it simply must be shown that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'" *Id.* (citation omitted).

In short, the purported circuit conflict does not exist.

C. The Ninth Circuit Correctly Applied *Adickes* And Its Progeny To The DeLews' Complaint.

Stripped of the artificial circuit conflict, Mrs. Wagner actually seeks a review of the Ninth Circuit's application of

well-established law to the DeLews' complaint. But this Court has more important things to do. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) ("We do not grant a certiorari to review evidence and discuss specific facts.") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

Equally important, Mrs. Wagner's position—that the DeLews failed to allege facts sufficient to support an inference of Mrs. Wagner's involvement in the conspiracy to cover-up the true facts surrounding her collision with Erin DeLew—is unsustainable on the merits. The complaint contains multiple paragraphs delineating the actions of the Police Defendants and Mrs. Wagner, and these allegations support an inference of an implied agreement or understanding between them to cover-up evidence of the true facts on September 27, 1994. *See* SA 7-8, 15-16 (Complaint) at ¶¶ 22(a)-(j), 37. Although the Ninth Circuit, in its decision, focused primarily on only one of the DeLews' allegations, *see DeLew*, 143 F.3d at 1223, its holding is even more correct when considered against the complaint's additional allegations of concerted conduct

III.

THIS COURT SHOULD DECLINE TO REVIEW THE NINTH CIRCUIT'S HOLDING THAT THERE WAS NO IMPROPER SPLITTING OF A CAUSE OF ACTION UNDER NEVADA LAW, WHERE THE ISSUE IS PURELY ONE OF STATE LAW AND WAS CORRECTLY RESOLVED.

In their third question presented, the Police Defendants challenge the Ninth Circuit's decision that there was not an improper splitting of causes of action. Police Defendants' Cross-Pet. at i, 17-19. This Court should deny the Cross-Petition on this issue. *First*, because Police Defendants raise an issue of pure state law, with no federal law ramifications, the question does not satisfy the Court's standards for the

exercise of its certiorari jurisdiction. *Second*, the Police Defendants' argument is utterly without merit.

A. Certiorari Is Inappropriate To Review The Ninth Circuit's Ruling On A Question Of Exclusively State Law.

The Police Defendants acknowledge that whether the DeLews split their cause of action by filing a separate complaint under § 1983 is a question of Nevada law. Police Defendants' Cross-Pet. at 18. But it is fundamental that this Court limits its certiorari jurisdiction to issues of federal—not state—law. Accordingly, the cause-of-action-splitting claim cannot meet the Court's guidelines for the exercise of jurisdiction.

Supreme Court Rule 10.1 lists "the character of reasons that will be considered" by the Court in deciding whether to accept a case for review on certiorari. Every one of the listed considerations implicates *federal* law. Significantly, Rule 10.1 omits one category of cases that appeared in the predecessor Supreme Court Rules, before their revision in 1990: a federal court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." SUP. CT. R. 19.1(b) (1970) (repealed 1990). This change confirms the Court's disinterest in questions of state law. *See also* ROBERT L. STERN, *ET AL.*, SUPREME COURT PRACTICE 183 (7th ed. 1993) (Court "uniformly declines review" of court of appeals decisions alleged to conflict with state law on the ground of misapplication of state statutes and case law "whenever the court of appeals has reached a reasonable and permissible result").

The Court should adhere to its regular practice in this case and should refuse to review the Ninth Circuit's application of Nevada decisions to the Police Defendants' claim that the DeLews improperly split their cause of action. As discussed

below, there is nothing exceptional about this issue, and the Ninth Circuit reached "a reasonable and permissible" result.

B. The Ninth Circuit Correctly Applied Nevada Law.

Relying on the Nevada Supreme Court's decision in *Smith v. Hutchins*, 93 Nev. 431, 432-33, 566 P.2d 1136 (1977), the Ninth Circuit held that "[t]he rule against claim splitting is not applicable here" because "[t]he Nevada state court [as distinguished from the DeLews themselves] effectively split the Delews' [*sic*] causes of action by denying their motion to join the two actions in one proceeding." *DeLew*, 143 F.3d at 1223. This aspect of the Ninth Circuit's decision was undeniably correct.

It is undisputed that the DeLews attempted to amend their state court wrongful death complaint to add their § 1983 claim as soon as they learned, through discovery, that there had been a cover-up and a conspiracy to deny them meaningful access to the courts. *See* SA 22 (Transcript of Hearing on Motion to Amend). It is also undisputed that the state court denied their motion to amend, holding that the civil rights claim was a "separate cause of action" that could not be brought into the state wrongful death case. *Id.* at 26 ("I'm not going to allow you to amend the Complaint because I think you need to file a separate lawsuit . . .") (Becker, J.). Moreover, Mrs. Wagner vigorously opposed the DeLews' motion to amend their state claim, insisting that their only avenue was to file a separate lawsuit. *Id.* at 23-25.[3]

Even absent the events described above, there would have been no improper splitting of a cause of action. The Police Defendants rely on the Nevada Supreme Court's decision in *Smith*—the same case cited by the Ninth Circuit—for the proposition "'all forms of injury or damage sustained by

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[3] The Police Defendants were not yet parties to the state case and, therefore, they could not have opposed the motion to amend.

the plaintiff as a consequence of the defendant's wrongful act [must] be recovered in one action . . .'" Police Defendants' Cross-Pet. at 18 (quoting *Smith*, 566 P.2d at 1137). But the Police Defendants fail to acknowledge the critical differences between the DeLews' wrongful death claim and their § 1983 claim. The two causes of action do *not* arise out of the same wrongful act by a single defendant; they are *not* based on the same facts; and they would *not* rely upon the same evidence at trial.

The DeLews' wrongful death claim arises out of Mrs. Wagner's actions when, drunk, she caused her car to careen into Erin DeLew and killed the young bicyclist. The DeLews' § 1983 cause of action arises out of distinct conduct on the part of Mrs. Wagner and the Police Defendants. The civil rights claim is not based on Mrs. Wagner's drinking and driving, nor on her collision with Erin DeLew. It is based on a subsequent cover-up by Mrs. Wagner and state and city defendants who were not even involved in the collision and were not conceivably liable for Erin DeLew's wrongful death.

Under these combined circumstances, it is plain that the Ninth Circuit reached a reasonable result when it held that the DeLews had not split their cause of action.

CONCLUSION

For all of the reasons stated above, the Court should deny both conditional cross-petitions for writs of certiorari.

Respectfully submitted,

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